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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

KAL W. LINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petition of Falstaff Brewing Corp., Goebel Brewing Company of California, Monteverde & Parodi, Inc., Ralph Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Company, Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Company, Twin Peaks Distributing Co., Vick's Distributing Company, N. Cervelli & Company, California Wine Association, Brown & Bigelow, Carlo Arbasetti, The Albert Peters Co., respectfully shows to this Honorable Court:

INTRODUCTION.

This was an appeal from an Order of the United States District Court for the Northern District of California, and the amendment thereto (T.R. 93-97) reversing an Order of a Referee in Bankruptcy appointing Respondent as Trustee of the estate of Alfonso Paul San Filippo, Bankrupt, and directing said Referee to appoint John M. England, the nominee of your Petitioners, as such Trustee (T.R. 94-97). The action arose at the First Meeting of Creditors of the San Filippo bankruptcy proceedings and involves the contested election of the Trustee. After due proceedings on the said appeal, the Court of Appeals for the Ninth Circuit, on the 15th day of May, 1956, entered its judgment reversing the order of the District Court (233 Fed. 2d 927, T.R. 110-122; Appendix A) and directing the District Court to affirm the Order of the

Referee. Thereafter, Petitioners filed their Petition for Rehearing with said Court of Appeals, which Petition was on the 15th day of June, 1956, denied (T.R. 124; Appendix C).

JURISDICTION.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1) and 11 U.S.C.A., Section 47 (c), Bankruptcy Act Section 24(c).

QUESTION PRESENTED.

Are creditors who are members of a trade organization, the Secretary of which acted as an Assignee for the benefit of creditors of an insolvent Debtor, barred from voting their own and other claims for the election of an otherwise fully qualified person as Trustee in Bankruptcy of that Debtor solely by reason of the fact that through that trade organization the claims in question were solicited for voting purposes in the name of the Creditors' Committee which procured the assignment from the insolvent Debtor?

STATUTES INVOLVED.

Bankruptcy Act Section 44(a) (11 U.S.C.A., Section 72(a)) which provides:

> "(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its

board of directors, or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication . . . appoint a trustee . . . of such estate."

FACTS.

Petitioners are sixteen (16) creditors of the above estate whose claims aggregate $3,735.56. These claims, plus those of four other creditors, Edwin J. Marino, Pacific Coast Brands, Eagle Vineyard Products and Gallo Sales Company, were all duly presented for voting at the first meeting of creditors of the above attorneys in fact designated in the Powers of Attorney contained in their respective proofs of claim. Said twenty (20) claims aggregating $4,508.67 were so voted for John M. England, as Trustee of the above estate. There were voted for Respondent, Kal W. Lines, only five (5) claims totaling $407.22. Only one (1) of the twenty (20) claims voted for Mr. England, to wit, one claim for $193.85, of Pacific Coast Brands, which was voted by Mr. England personally, was not objected to by Respondent.

While the record is somewhat obscure as to the exact nature and grounds of the objections made on behalf of Respondent to the voting of the nineteen (19) claims for Mr. England, it would appear that said objections are based entirely upon an alleged impropriety of permitting these creditors to select a trustee herein. These claims were admittedly solicited by the Creditors' Committee of this bankrupt at the

Board of Trade of San Francisco on the letterhead of the latter (which letter was signed by the five (5) members of the Creditors' Committee).

Under these circumstances, Petitioners contend that the only basis upon which they, as creditors, could properly have been disenfranchised by the Referee in Bankruptcy and their preponderance of voting claims, in both number and amount, for Mr. England as Trustee disregarded and disapproved by the Referee's Order herein, was that their nominee, if elected, would have an interest adverse to the estate in question and/or would not fairly and honestly administer same.

Reasons relied upon for the allowance of this Writ:

1. *That the decision of the Court of Appeals* is contrary to law and legal precedent and *is in conflict with a decision of the United States Court of Appeals for the Tenth Circuit (In the Matter of Garrison v. Pilliod Cabinet Co., et al.,* 50 Fed. 2d 1035, 18 A.B.R. (n.s.) 409).

2. That the Court of Appeals has decided an important question of Federal law which has not heretofore been, but should be, settled by this Court.

3. That the effect of the decision of said Court of Appeals is widespread and will result in the *disenfranchisement* of creditors because they are members of legitimate trade associations which, in the interests of orderly liquidation of the assets of insolvent debtors, procure and administer assignments for the benefit of creditors generally and which creditors

would otherwise be clearly entitled to vote their claims for the election of a Trustee in bankruptcy proceedings.

4. That the matter here involved is one of vital importance to the administration of the estates of bankrupts under the Bankruptcy Act throughout the United States and one which it is in the public interest to have decided by this Court of last resort.

ARGUMENT.

I.

THE COURT OF APPEALS IN FINDING THAT THERE WAS EVIDENCE TO SUPPORT THE REFEREE'S FINDING THAT THE VOTES OF PETITIONERS REPRESENT AN ATTEMPT BY THEM TO RETAIN "SOME SORT OF CONTROL" OVER THE BANKRUPT ESTATE FOR THE BENEFIT OF THE BOARD OF TRADE WAS IN ERROR FOR THE REASON THAT THE FINDING BY THE REFEREE WAS CLEARLY ERRONEOUS AND WAS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE AND/OR REASONABLE INFERENCE.

The opinion of the District Court in this case may be found in 130 Fed. Supp. 312 and at pages 79-85 of the Transcript of Record herein.

The opinion of the Court of Appeals for the Ninth Circuit may be found in 233 Fed. 2d 927 and at pages 110-122 of the Transcript of Record herein (Appendix A).

The Bankruptcy Act, Section 44(a), 11 U.S.C.A., Section 72(a) provides:

> "(a) *The creditors* of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stock-

holders or members, its officers, and the members of its board of directors, or trustees or of other similar controlling bodies, *shall*, at the first meeting of creditors after the adjudication . . . *appoint a trustee . . . of such estate.*" (Italics ours.)

Obviously, none of your Petitioners are within the class excluded from voting by the foregoing statutory provision. Prior to February 13, 1939, under General Order in Bankruptcy, No. 13, 11 U.S.C.A., page 53, as of which date it was abrogated by the Supreme Court of the United States, the appointment of a trustee by the creditors was "subject to be approved or disapproved by the Referee." We can find neither in the General Orders in Bankruptcy nor in the Bankruptcy Act itself any similar or revised provision giving the Referee in Bankruptcy any such specific authority. It would seem, therefore, that although prior to February 13, 1939 (under conditions which will be hereinafter discussed, and which are wholly inapplicable to the case at bar), the referee might have undertaken to disapprove the election of a trustee, under the law applicable to the case at bar, the referee obviously was not justified in so doing. It should here be noted that the abrogation of former General Order No. 13 in February 1939 was made shortly after the Chandler Act Amendment to the Bankruptcy Act became effective in September 1938. Previously, Section 44(a) did not specifically provide the exceptions to the absolute right of creditors to appoint a trustee, hence the supervisory jurisdiction conferred upon the referee by the Supreme Court's

General Order. The 1938 Amendment to Section 44(a) gives the specific exceptions, hence the supervisory powers of the Referee elections were deemed unnecessary.

That a Bankruptcy Court is a Court of equity and that the broad principles and rules of equity jurisprudence govern and apply in the administration of bankrupt estates is not disputed by Petitioners. However, the exercise of the equitable principles and the discretion conferred upon the Referee in Bankruptcy must be in conformity with law and as was stated by District Judge Carter in his Memorandum and Order of March 31, 1955 (T.R. 84, 130 F. Supp. 312) the Referee cannot, to support his order:

> "*torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him.* Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and *the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.*" (Italics ours.)

In both his Summary of Record, Findings of Fact and Conclusions of Law Relative To Contest Over Election of Trustee in Bankruptcy, (T.R. 46-55) and his Certificate and Report of Referee relative to Petition for Review of Referee's Order of May 26, 1956 (T.R. 27-45), the Referee cites numerous cases in support of his position, none of which involve contested elections of a Trustee in Bankruptcy which took place after the abrogation of General Order in Bankruptcy No. 13. For that reason, we feel they are not important. However, on the general subject of the alleged "adverse interest", and in keeping with the theory of the Referee and of the Court of Appeals that even without such General Order, the Referee has the power to sustain objections to the election as Trustee of a person disqualified by adverse interest or by lack of personal qualifications and/or integrity, these cases will be discussed and distinguished.

In re Stowe, 235 F. 463, 38 Am. B.R. 76, was a case in which there was evidence that the bankrupt was involved in soliciting the claims for the disqualified candidate for the Trustee, and also indication that the attorney for the assignee for the benefit of creditors was attempting to control the election. No such facts appear in the instant case.

In re Leader Mercantile Co., (C.C.A. 5) 36 F. (2d) 745, 746, involves a situation where one Hall, who received votes of the majority in number and amount of claims withdrew and took no further part after the Referee vetoed his election by reason of his activities in soliciting claims. Strangely enough, one of

the points overruled by the court in that case was the alleged lack of authority in the Supreme Court to adopt General Order No. 13. The decision is based principally upon the now abrogated General Order No. 13, and, further restricts the rights of creditors to select the trustee *only* to the extent that their nominee be a "competent person". The court there holds that "competent" within the intent of the Act has a very broad meaning equivalent to "qualified" and fulfilling all the requirements of the case, and further, "while undoubtedly the policy of the courts is to permit the creditors to have the broadest latitude in the administration of the bankrupt's estate, nevertheless the courts are charged with the duty of supervision, and there is always the power in a court to intervene to prevent the selection of an *incompetent* person as trustee. *Of course, this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial discretion.*" (Italics ours.) This latter quotation does not appear in the Referee's notes nor in the Respondent's brief, and supports Petitioners' position herein.

In re Deena Woolen Mills, (D.C., Me.), 114 F. Supp. 260, 267, 268, involves an exaggerated and inflammatory situation where the attorneys for the assignee and the receiver solicited claims and where the attorney for the assignee for the benefit of creditors had been selected by the attorneys for the bankrupt. Solicitation of claims by a receiver or his attorney is expressly prohibited by General Order No. 39, which reads as follows:

"Neither a receiver nor his attorney shall solicit any proof of claim, power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any arrangement or plan."

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520, 526, is merely an admiralty case.

The case of *Delno v. Market St. Ry. Co.,* (C.C.A. 9), 124 F. (2d) 965, 967, is inapplicable to the case at bar, and merely defines the legal concept of a court's "discretion".

By statute, the unqualified right to appoint trustees in bankruptcy vests in the creditors. (*In re Harris Construction Company,* 37 F. (2d) 951, 14 Am. B. R. (n.s.) 641.) Approval or disapproval of their choice must be for reason, and based on the exercise of wise discretion. There must be reason for disapproval or removal.

In re Mayflower Hat Co., Inc., 65 F. (2d) 330;
In re Harris Construction Company, supra;
In re Bay Parkway Haberdashers & Hatters, Inc., 59 F. (2d) 103;
In re Van de Mark, (D.C.), 175 Fed. 287, 23 Am. B. R. 760;
In re Malino, 118 F. 368, 8 Am. B. R. 205.

Remington on Bankruptcy, Fourth Edition, Volume 2, Section 1094, page 631, at 633:

"All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt, must, as a

general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored."

Wilson v. Continental Building and Loan Association, 232 F. 824, 37 Am. B. R. 444.

"The choice of the creditors should not be overruled by the Referee or District Judge except for substantial reasons, and the confirmation by the District Judge of such appointment should not be disturbed by this Court unless an abuse of discretion appears."

In re Merritt Construction Company, 219 F. 555, 33 Am. B. R. 616.

"If the persons appointed by creditors are competent to perform the duties, and if they have residence or an office in the District, the Creditors' appointment should be approved."

Remington on Bankruptcy, supra, page 633.

"The policy of the Bankruptcy Act as shown in its provisions is to give to creditors of the Bankrupt the free, deliberate and an unbiased choice in the first instance of the persons who are to represent them and manage the assets of the Bankrupt estate. (*In re Lewensohn*, supra.) It cannot be denied that the vital interests which creditors have in the preservation and wise management of the estate of a bankrupt must as a general rule make them the best judges of who shall be appointed as Trustee, and their selection cannot be arbitrarily ignored."

In re Allied Owners Corp., Bankrupt, 4 F. Supp. 684, 24 Am. B. R. (n.s.) 151.

In re Allied Owners Corp., supra, involves a petition for review of an order disapproving an election of one Greve as trustee on the grounds of partiality in or connected with the transaction and affairs of the bankrupt, and wherein the Referee's order was reversed. The court discussed the rights of creditors in the election of a trustee, and, in finding that Greve was merely associated with affiliated companies of the bankrupt, held that this was not sufficient to disqualify him, and pointed out that his familiarity with the business enhanced his desirability.

> "Courts should not assume that *creditors* cannot elect an impartial Trustee. *Their choice should be recognized and upheld unless contrary to law* or it appears that the Trustee so selected has interests which conflict with those of the general creditors of the bankrupt estate, (*In re Mayflower Hat Co.,* (C.C.A.) 65 F. (2d) 330, 331), or unless there is reason for believing that the selection has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests. (*In re Eastlack,* (D.C.) 145 F. 68, 73.)
>
> The sole power conferred by the Bankruptcy Act on the Referee or judge in relation to the appointment of a Trustee is contained in Section 44 (11 U.S.C.A. 72, supra) where it is provided that, if the creditors do not appoint, 'the court shall do so.' *The Act, therefore, contains no provision conferring on the Referee or judge the right to disapprove an appointment made by the creditors.* (*In re Krueger,* (D.C.) 196 F. 705, 707.) The right to do so is to be found in General Order 13 (11 U.S.C.A., p. 53) promulgated by

the Supreme Court pursuant to statute, which provides: 'The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable, by the referee or by the judge.'

Thus *by this General Order courts of bankruptcy are vested with a supervisory power* to meet emergencies and exigencies which could not be foreseen or provided for in the statute. But the emergency must not be a trivial one. It should be of grave character and due weight, or *the effect of the use of this supervisory power is to disenfranchise the creditors and deprive them of rights expressly conferred upon them by statute.* (*In re Lloyd,* (D.C.), 148 F. 92, 93.) Since this is the ultimate result of the use of this supervisory power, its use must be sparingly exercised with sound judicial discretion and not arbitrarily or capriciously." (Italics ours.)

The above indicates that even this limited supervisory power in the Court was derived from the now abrogated General Order No. 13.

In *In re Mayflower Hat Co., Inc.,* 65 F. (2d) 330, on principle, it cannot be perceived why an agent for a creditor should not be permitted to vote as a creditor might, if by so voting he is not disqualified to vote for himself to act as trustee. If the creditors who have unsecured claims filed and allowed . . . may vote for themselves, they may authorize agents to vote, and the majority of creditors in number and amount may control the election, and their choice must be upheld by the court, unless it appears that the trustee so elected has an interest adverse to the bankrupt estate.

See, also:

In re Lazoris, (D.C.), 120 F. 716;

In re Van de Mark, (D.C.), 175 F. 287.

In re Cass and Daley Shoe Co., 11 F. (2d) 872, held that if openly and honestly organized and conducted, a Creditors' Committee in bankruptcy proceedings may be of great assistance. Creditors' assignment of claims to Creditors' Committees was held not to disenfranchise them or the representative of such Creditors' Committee from voting for a trustee. The bankrupt may put itself into the hands of such a committee or in the hands of its principal creditors and such an act is not "collusion" in the sinister bankruptcy use of the word, *and these creditors have the right to vote for trustee.*

The Referee, in the order reversed by the District Judge, did exactly what the Circuit Court in the case of Cass and Daley Shoe Co. supra, disapproved, and the latter Court reversed an order of a referee similar to that of Referee Wyman in the instant case, which, by the Order of the District Judge here appealed from was also reversed.

As indicated above, at the hearing before the Referee, Petitioners, through their counsel, made a detailed "offer of proof". (Ref. Cert., T.R. 31-33.) The relevancy of the evidence offered and so improperly rejected by the Referee is obvious from the context thereof in the light of the decisions above cited. In view of the fact that no contrary evidence was either offered or received, it would seem that the record is clearly devoid of evidence to support the

Referee's disenfranchisement of Petitioners. If, as we contend, the offer of proof should have been accepted, the record would overwhelmingly support the propriety of the election of Mr. England by 20 creditors out of the 25 voted, and whose claims aggregated over 95% of the amount thereof.

The complete lack of control or even suggestion of the selection of Mr. England as their candidate by the Board of Trade, and/or the Creditors' Committee itself, was clearly indicated by the evidence so offered by Petitioners and refused by the Referee. The impartiality of the administration of the bankrupt's estate as to Mr. England himself was openly conceded by Respondent (T.R. 35).

> "Mr. Shapro. . . . If I may, I should like to direct a question to Mr. Margolis in connection with this objection, so the record may be clear. I would like to know if it is your contention, Mr. Margolis, that if Mr. England's election as trustee in this case were approved by this Court, that he would administer this estate other than impartially, fairly and accurately?
>
> Mr. Margolis. Absolutely not. . . ."

and it is further emphasized and supported, without contradiction, by all of the evidence in the record and that which was so offered and refused. (Referee's Finding No. 14 (T.R. 54).)

The Referee's decision in this case was not based upon "sound judicial discretion", and was not used "sparingly", and was, in effect, arbitrarily exercised. We are at a loss to understand the action of the Court of Appeals in affirming it.

II.

NEITHER THE BANKRUPTCY ACT NOR THE GENERAL ORDERS PROHIBIT ANYONE BUT A RECEIVER OR HIS ATTORNEY FROM SOLICITING CLAIMS. NOT EVEN AN ASSIGNEE FOR THE BENEFIT OF CREDITORS IS SO DISQUALIFIED.

The decision in *Garrison v. Pilliod Cabinet Co., et al.,* 50 Fed. 2d 1035, 18 Am. B. R. (n.s.) 409 by a Court of equal jurisdiction with the Court of Appeals for the Ninth Circuit was neither cited nor distinguished in the opinion of the Court of Appeals for the Ninth Circuit in its Judgment of the 15th of May, 1956. In the case at bar, we do not have the assignee soliciting the claims (as found in the Garrison case, supra) but merely the Creditors' Committee who admittedly are members of the Board of Trade of San Francisco, of which and for which Mr. Hempy acted as assignee for the benefit of creditors of the bankrupt San Filippo. There was no showing before the trial Court by Respondent and hence there is in the record before this Court no *evidence* to support the insidious implications as to the alleged disqualification of Petitioners and/or of Mr. England, their nominee, which is embodied in and necessarily follows from the opinion of the Court of Appeals for the Ninth Circuit here sought to be reviewed.

That there is no evidence in the record before the Court of Appeals for the Ninth Circuit to support any of the findings which "taken together, however . . .", persuaded this court that "they are findings regarding which 'reasonable men could differ as to the propriety of the action taken'" (T.R. 119). The

distinction between the case at bar and the decision in *In re Stowe*, supra, is obvious; there the connivance complained of was between certain creditors and the bankrupt and/or his attorney, as well as the assignee.

CONCLUSION.

At no time have Petitioners contended that the Referee has no jurisdiction, *in a proper case*, to sustain objections to and/or disapprove the election of a trustee by creditors whose interests are, or might be adverse to the bankrupt estate itself; but conversely, our position is that the Referee's actions in so doing "must be governed entirely upon statutory principles." The statute in question is Section 44(a) of the Bankruptcy Act, 11 U.S.C.A., Sec. 72(a), fully discussed above.

The only basis upon which these creditors could properly have been disenfranchised by Referee Wyman was *if* there was sufficient *evidence* that Mr. England, their nominee, would have an interest adverse to the estate and/or would not fairly and honestly administer same. (Ref. Cert. T.R., p. 38.) *The evidence received by the Referee* as well as that offered by Petitioners and refused by the Referee (Ref. Cert. T.R. 31 through last full paragraph p. 32), *is all to the contrary.*

As he said in his Memorandum and Order (T.R. p. 80), the District Judge gave full weight to the Referee's findings, but found them erroneous. Judge Carter's opinion (T.R. pp. 79-85) clearly indicates

the full consideration given by him to the record, and his order of reversal (T.R. pp. 94-97) is amply justified.

We believe that there was neither substantial legal ground shown before Referee Wyman, nor any evidence upon which his contrary findings or conclusions could be predicated, justifying the disenfranchisement of the vast majority of the creditors who, including Petitioners, selected Mr. England rather than Respondent to act as Trustee of the above estate. The Court of Appeals for the Ninth Circuit's Order of May 15, 1956, should be reversed, and the District Court's Order of March 31, 1955, should be affirmed by this Court.

Wherefore, Petitioners pray that a Writ of Certiorari issue out of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above matter on May 15, 1956, under its Docket No. 14,821 and that your Petitioners may thereafter have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
August 24, 1956.

Respectfully submitted,
SHAPRO & ROTHSCHILD,
ARTHUR P. SHAPRO,
AUGUST B. ROTHSCHILD,
By ARTHUR P. SHAPRO,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kal W. Lines, *Appellant,* vs. Falstaff Brewing Co., et al., *Appellees.*	No. 14,821 May 15, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division

Before Pope, Lemmon, and Chambers, Circuit Judges. Lemmon, Circuit Judge.

In one of the finest passages in judicial literature, Chief Judge Cardozo of the New York Court of Appeals—later Associate Justice of the United States Supreme Court—laid down the high standards that should be demanded of a trustee:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, *but the punctilio of an honor the most sensitive,* is then the standard of behavior. As to this there has developed a tradition that is unbending and

> inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. [Case cited.] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."[1] [Emphasis supplied]

Imposed both by ethics and equity, these high standards are exacted of bankruptcy trustees as much as of other species of the genus. "The punctilio of an honor the most sensitive" must be observed in the *selection* of such trustees as well as in their own discharge of their duties.

1. *Statement of the Case*

The appellees, sixteen creditors of Alfonso Paul Sanfilippo, who was adjudged a voluntary bankrupt on April 19, 1954, had claims aggregating $3,735.56. These claims, plus those of four other creditors, Edwin J. Marino, Pacific Coast Brands, Eagle Vineyard Products and Gallo Sales Company, were all presented for voting at the first meeting of creditors by the attorneys in fact designated in the powers of attorney in their respective proofs of claim.

These twenty claims, aggregating $4,508.67, were voted for John M. England, as trustee. Only one of these claims, that of Pacific Coast Brands, for $193.85, was not objected to by the appellant.

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[1]Meinhard v Salmon, 1928, 249 N.Y. 458, 164 N.E. 545, 63 ALR 1, 5.

On December 17, 1953, the bankrupt made a general assignment of all the assets of his business to the Board of Trade of San Francisco, for the benefit of his creditors. The Board of Trade had in its hands assets of the bankrupt amounting to $4,054.88, according to the bankrupt's sworn statement of affairs.

On April 23, 1954, claims were admittedly solicited by the Creditors' Committee of five members at the Board of Trade, using the letterhead of the Board. Creditors were requested to return an "enclosed . . . form of proof . . . to the undersigned Committee *in care of the Board of Trade.*" [Emphasis supplied] The letter also recited that the Committee had been "appointed at the general meeting of creditors *held at the Board last December.*" [Emphasis supplied]

Walter J. Hempy, secretary of the Board of Trade, was named assignee in the general assignment made by the bankrupt for the benefit of creditors, before the voluntary petition was filed.

The referee found that "all the activities of the membership of the Creditors' Committee . . . after the making . . . of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of the said" bankrupt.

The referee also found that there were 19 claims voted by Arthur P. Shapro, counsel for the appellees, aggregating $4,314.82, which claims were objected to by the appellant and the creditors represented by him; and that "it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over

the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade."

The referee also found that "it would not be . . . for the best interest of all the creditors . . . and particularly the creditors [that] are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee . . ." The referee added:

"That John M. England has but one (1) claim, in the sum of $193.88 [$193.85], favoring him as trustee, to which no valid objection has been made.

"That [the appellant], so far as number was, and is, concerned herein, has three (3) claims aggregating the sum of $375.65, favoring him, as trustee herein, to which no valid objection has been made, and that none of such claims is that of any member of said Board of Trade.

"That [the appellant], so far as amount was, and is concerned herein, has five (5) claims (including the three (3) last mentioned claims) in the total sum of $407.21 favoring him, as trustee herein, to which no valid objection has been made, and that none of said claims is that of any member of said Board of Trade.

"That nothing herein contained is intended to be construed, nor is it, any reflection whatsoever, on said John M. England to act as trustee in bankruptcy."

The referee concluded that the appellant "has a majority, both in number and in amount of the claims of creditors which are entitled to be counted herein to be voted for trustee"; and "to allow any of the . . . 19 claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction."

At a meeting of creditors held before the referee, counsel for the appellant disavowed any contention that England would administer the estate "other than impartially, fairly, and accurately", but pointed out that "the Board of Trade has an interest in this matter to be reimbursed for any expenses it incurred."

"The Creditors' Committee," counsel contended, "being members of the Board of Trade, would have to make up any deficiency, it not being a profit-making organization. Therefore, it seems to me it would be sufficient interest, where the Board of Trade took an active part in securing these powers of attorney, to disallow the election on the basis of the claims before this Court."

In its "Memorandum and Order", the District Court conceded that "The rule in this circuit is that the findings of the referee should not be set aside unless clearly erroneous"; and that the District Court "does not hold that referees in bankruptcy have lost their supervisory power over the election of a trustee". The District Judge added, however, that he would "examine the proceedings before the referee to

see if that power was exercised for good cause". In re San Filippo [sic], DC Calif., 1955, 130 F.Supp. 312, 314.

And it is upon this question of "good cause" that the present case turns.

2. *A Court of Bankruptcy Is a Court of Equity.*

In Pepper v. Litton, 1939, 308 U.S. 295, 304, the Court said:

> ". . . this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' [Case cited.] By virtue of Sec. 2 [of the Bankruptcy Act] a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence. [Case cited.]"[2]

3. *The District Court and This Court Should Accept the Referee's Findings Unless They Are "Clearly Erroneous".*

General Order in Bankruptcy No. 47 reads as follows:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, *and the judge shall accept his findings of fact unless clearly erroneous.* The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or

[2]See also The First National Bank of Portland v Dudley, 9 Cir., decided March 13, 1956, at Page 9 of the slip opinion, and the case there cited.

may receive further evidence or may recommit it with instructions." [Emphasis supplied]

In Earhart v Callan, 9 Cir., 1955, 221 F. 2d 160, 164, certiorari denied, 1955, 350 U.S. 829, we said:

"The scope of review which the District Court and this court afford to orders of a referee in bankruptcy is governed by the General Orders in Bankruptcy. . . . These Orders, as implemented by Rules 52(a) and 53(e) of the Federal Rules of Civil Procedure, 28 U.S.C.A., require the District Court to accept the referee's findings unless clearly erroneous. [Cases cited.] Similarly, this court may not set aside the findings of the referee unless they are clearly erroneous. [Cases cited.]"[3]

4. *Creditors Are Frequently Shortsighted and Careless in the Appointment Of a Trustee.*

Sharp warning that creditors are "apt" to be shortsighted and careless in the selection of a trustee is contained in 2 Remington on Bankruptcy Sec. 1094, pages 631-632:

"The importance of the right choice of trustee cannot be over-estimated. In him, administrative power is centered. If an able, vigorous, and independent trustee is appointed, the administration is likely to be equally able, vigorous, and independent. If one is appointed, however, who is indolent, easy-going, *or subject to influence*, there are bound to supervene jobberies, inefficiencies, and rascalities. Eternal vigilance is the price of keeping bankruptcy administration free from fraud and machinations.

* * *

[3]See also Morris Plan Industrial Bank v Henderson, 2 Cir., 1942, 131 F.2d 975, 976-977.

"The present Bankruptcy Act is founded on the democratic principle of creditors' suffrage—it is the creditors who elect the trustee to administer the estate. But the ballot is abused in the bankruptcy world just as in the world of politics. Creditors, after giving over their claims to their particular instrumentality for collection, *are apt, shortsightedly, to abandon further care; with the frequent result that collusion, bargainings, or shiftlessness take the place of vigorous administration.* In the early days of the Bankruptcy Act, *the soliciting of claims by schemers was reprobated as the cause of the evils. But the solicitation of claims is no longer necessary,* for on notice of the bankruptcy, claims begin to pour in *without solicitations* to the different agencies or organizations for collection; *yet collusions, bargainings, and jobberies seem equally common.* If creditors, into whose hands the policy of the Bankruptcy Act has entrusted the guardianship of insolvent estates, were more awake to the importance to their own interests of the performance of their fundamental duty of choosing and supporting virile, earnest, and *independent* trustees, . . . there would be felt soon in a multitude of ways profoundly salutary effects upon the various business communities." [Emphasis supplied]

5. *A Referee Has Broad Powers in the Administration of a Bankrupt's Estate, Especially with Reference to the Selection Of a Trustee.*

General Order 13 provided as follows:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only."

The above order was abrogated on January 16, 1939, effective on February 13, 1939. From this abrogation, the appellees attempt to spell out a referee's complete loss of authority to disapprove the election of a trustee:

> "It would seem, therefore, that although prior to February 13, 1939 (under conditions which will be hereinafter discussed, and which are wholly inapplicable to the case at bar), the referee might have undertaken to disapprove the election of a trustee, *under the law applicable to the case at bar, the referee obviously had no such jurisdiction.*" [Emphasis supplied]

In making this statement, the appellees have fallen into gross error. As we have seen, the Court below, whose order the appellees seek to have us affirm, specifically rejected such an interpretation of the abrogation of Order 13, declaring that "this Court does not hold that referees in bankruptcy have lost their supervisory power over the election of a trustee."

The powers of a referee in connection with the administration of a bankrupt's estate remain broad, even since the abrogation of Order 13. In Sloan's Furriers, Inc., v. Bradley, 6 Cir., 1945, 146 F. 2d 757, 759, 760, the Court said:

> "The actual administration of bankrupt estates is, by the law, left largely to the referees, and it is settled practice not to disturb their acts unless a plain and injurious error of law or abuse of discretion is shown. [Case cited.]"

This sweeping supervisory power of a referee includes a reasoned veto of the selection of a trustee.

In the case of In re Deena Woolen Mills, DC Me., 1953, 114 F. Supp. 260, 267-268, the Court used the following language:

> "Although the creditors are the primary participants in the election of a trustee, their choice must be *governed* by the discretion of the Referee in the interest of promptness and impartiality. He presides over the election of a trustee *and determines, with proper judicial discretion, what creditors have the right to vote.* [Cases cited.] His function in the election of a trustee is to exercise a legal discretion in expediting the election and securing an impartial trustee, and *to approve or disapprove the appointment depending upon the circumstances of the particular case.* [Emphasis supplied]
>
> "As stated In Matter of Rosenfeld-Goldman, D.C., 228 F. 921, at page 923:
>
> > 'The actual administration of bankrupt estates is, under the present law, left largely to the Referees. It is the settled practice of this court not to disturb their acts in administrative matters—of which the election of a trustee is a typical example—*unless a plain and injurious error of law or abuse of discretion is shown.*' (Emphasis supplied.) [Case cited.]"[4]

The appellees quote extensively—though somewhat inaccurately and repetitively—from an opinion of this Court in Wilson v Continental Building & Loan Ass'n., 9 Cir., 1916, 232 F. 824, 827, as follows:

---

[4]For cases decided prior to the abrogation of Order 13, see In re Pan-American Match Co., DC Mass., 1917, 242 F. 995, and In re Austin Resort & Land Co., DC Cal., 1935, 12 F.Supp. 459, 462.

"All must agree that the vital interest which creditors have in the preservation and wise management of the estate of the bankrupt, must, as a general rule, make them the best judges of who shall be appointed as trustee, and their selection cannot be arbitrarily ignored."

The appellees' second quotation from the *Wilson* case is obviously garbled, and we do not reproduce it here. Had the appellees pursued their first quotation further, however, they would have disclosed this Court's important qualification of the rule:

"But the Supreme Court, in the exercise of its power to make general orders in bankruptcy, foresaw that instances might arise where, notwithstanding the desire of the creditors for the selection of some particular person as trustee, the best interests of the estate would not be served by allowing such choice to stand, and they reserved a supervisory power in the referee or judge. [Page 827]

* * * *

"The duties which a trustee may be called upon to perform under the Bankruptcy Act and General Order 17 . . ., and others, are often of a character which require him to reclaim property and sue to avoid transfers, to take possession of property, books, and papers belonging to the estate, to redeem and discharge mortgages upon real property, to defend pending suits, possibly to call for assessments upon stockholders of a bankrupt corporation, to demand accountings from those who have business relations with the bankrupt, and to do very many things which can best be done where there is no relationship out of which

there can arise any conflict of interest, or even serious embarrassment to the trustee, by reason of business relationships, or, in case of corporations, by having directors or officers in common." [Page 828] [Emphasis supplied]

6. *The Area of Discretion*

At this juncture, it might be well to pause and reflect upon the precise meaning of "discretion"—a convenient expression frequently used, but not often defined.

In Delno v Market St. Ry. Co., 9 Cir., 1942, 124 F.2d 965, 967, this Court thus expatiated on the subject:

> "In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court'. 1 Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal except when there is an abuse of discretion. A common example is a court's ruling on the extent of cross-examination. [Case cited] Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused *ONLY* where no reasonable man would take the view adopted by the trial court. *If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be*

said that the trial court abused its discretion." [Emphasis supplied][5]

Since the power of review entrusted to a District Court vis-a-vis the findings of a referee is identical with that of a Court of Appeals with respect to the findings of a District Court, the above excerpt is apposite here. In each case, the findings are not to be set aside "unless clearly erroneous". Cf. General Order No. 47, *supra,* and Rule 52(a) of the Federal Rules of Civil Procedure.

7. *Since "Reasonable Men Could Differ as to the Propriety of the Action Taken" by the Referee, It Cannot Be Said That He Abused His Discretion.*

It will be recalled that the bankrupt made a general assignment to the Board of Trade; that claims were solicited on letterheads of the Board; that the letter recited that the Creditors' Committee had been appointed at a meeting of the creditors held at the Board; that Hempy, the Board's secretary, was the general assignee; that the Referee found *as a fact* that it was the Committee's intention "indirectly to keep, if possible, some sort of control" over the "bankrupt's assets"; and that the Referee also found that it would not be "for the best interest of all the creditors" to count the claims thus garnered "in voting for any candidate for trustee".

Considered separately, none of these findings might be thought sufficient to support the Referee's holding in favor of the appellant. Taken together, however,

[5]See also Langnes v Green, 1931, 282 U.S. 531, 541.

they persuade us that, whether we agree with them or not, they are findings regarding which "reasonable men could differ as to the propriety of the action taken."

In the case of In re Stowe, DC Cal., 1916, 235 F. 463, 464, Judge Maurice T. Dooling said:

> "Neither the bankrupt himself, nor his attorney, *nor an assignee,* nor his attorney, *can be permitted to control the selection of a trustee.* If creditors knowingly join with the bankrupt or his attorney, or *with an assignee or his attorney,* in an effort to do what it has repeatedly been decided they may not do, the simplest and most obvious way to defeat their purpose is to reject their selection of trustee, and permit the creditors who are not in the combination to make the selection. That was done in the present instance and the action of the referee is affirmed." [Emphasis supplied]

8. *"Not Honesty Alone—"*

During the hearing before the Referee, counsel for the appellees made an offer of proof in connection with the testimony of an employee of the attorney for the San Francisco Board of Trade. Counsel proposed to show that the transmittal of the letter referred to above, "and its preparation in this form was at the express instance and request of the Creditors' Committee". It might be observed in passing that all the members of the Creditors' Committee were members of the Board of Trade.

Counsel also offered to prove that the proof of claim that accompanied each letter was prepared by the

witness and transmitted by the office of the Board at the request of the Committee; that the designation of the power of attorney, "or the names of the attorneys both in the letter and proof of claim and the letter of attorney for [counsel's] office were so entered at the request of the . . . Committee"; that neither the assignee nor his attorney, nor any member of the Board's staff suggested the designation of the attorneys in fact or the powers of attorney in the claims referred to in the letter; that at no time prior to counsel's announcement in court of his candidate for trustee was the name of any candidate known to the witness or any member of the Board of Trade, including the Committee. Finally, counsel offered to prove by his own testimony that he consulted with no one whatsoever with reference to his candidate for trustee; namely, Mr. England; that the latter had received no information of counsel's intention to nominate him; that Mr. England has no connection with the Board; and that Mr. England would administer the estate "fully, fairly, and honestly, and the fact that there was an assignment to the Secretary of the Board of Trade . . . by the bankrupt within four months immediately preceding the bankruptcy would not in any way influence him in the administration of the estate, nor influence any one, so far as I know, in the administration of the estate."

Taking all the foregoing proffer as equivalent to evidence, we still believe that there was rational basis for the referee's finding that "all the activities of the membership of the Creditors' Committee . . . after the making . . . of the aforesaid assignment were as

members of said Board of Trade and not merely as creditors of said" bankrupt. It must be remembered that the assignee of the bankrupt was also the secretary of the Board.

As counsel for the appellant points out, it was not at all improbable that there might develop a controversy over the bankrupt's business assets in the hands of the Board. In disqualifying Board-sponsored creditors, the referee exercised a sound discretion.

Finally, the appellees rely greatly upon the appellant's concession that it was not contended that Mr. England, if elected trustee, "would administer this estate other than impartially, fairly and accurately". There are two complete though cognate answers to the appellees' argument on this point:

First, as Chief Judge Cardozo pointed out in the opinion quoted at the beginning of this opinion, "Not honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior" for a trustee.

Second, we can here apply to Mr. England language used with regard to another trustee, in the case of In re Bloomberg, DC Minn., 1931, 48 F. (2d) 635, 637:

> "As a practical matter, I am satisfied that in this proceeding Mr. Miller could administer the estate as well as any other person, and that the creditors' interests *might even be better subserved by him than by any other person,* in view of the fact that he has now had charge of the estate for some two months. *However, the complaint is not*

against him, but against the method used in securing his appointment." [Emphasis supplied]

In that case the District Court reversed the referee's order approving Mr. Miller's appointment. Although the facts in that case were different from those at bar, the decision does bear upon the point that, in a trustee in bankruptcy, mere honesty is not enough. The influences back of his appointment are also important.

9. *Conclusion*

In view of all the circumstances surrounding the securing of nineteen of the twenty claims that voted for Mr. England as trustee, the referee did not abuse his discretion in refusing to count those nineteen claims, and in appointing the appellant as trustee instead.

Accordingly, the order appealed from is reversed, with directions to the District Court to affirm the order of the referee.

(Endorsed:) Opinion. Filed May 15, 1956.
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,821

Kal W. Lines,
Appellant,
vs.
Falstaff Brewing Co., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellees, with directions to the said District Court to affirm the order of the referee.

It is further ordered and adjudged by this Court, that the Appellant recover against the Appellees for his costs herein expended and have execution therefor.

(Endorsed) Judgment
Filed and Entered: May 15, 1956
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, June 15, 1956
Before: Pope, Lemmon and Chambers, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed June 12, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

FILED
SEP 28 195
JOHN T. FEY, CL

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

MAX H. MARGOLIS,
155 Montgomery Street, San Francisco 4, California,
Counsel for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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KAL W. LINES,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATUTES INVOLVED.

Bankruptcy Act, section 1 (9) (11 U.S.C., §1 (9)) which provides that

> "'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

Bankruptcy Act, section 2 (a) (17) (11 U.S.C., §11 (a) (17)) which invests courts of bankruptcy with jurisdiction "at law and in equity" to

> "Approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice".

Bankruptcy Act, section 2 (b) (11 U.S.C., §11 (b)):

> "(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Bankruptcy Act, section 44(a) (11 U.S.C., §72 (a)):

> "(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers and the members of its board of directors or trustees or other similar controlling bodies, shall at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed

fails to qualify as herein provided, the court shall make the appointment."

QUESTION INVOLVED.

Under the facts and circumstances of the case, was it irrational for the Court of Appeals to hold that the referee did not abuse his discretion when, acting on equitable grounds, he disqualified the claims of some of the creditors in the vote for trustee?

STATEMENT OF THE CASE.

Respondent and one England were rival candidates for election as trustee at the meeting of the bankrupt's creditors held May 20, 1954. The statement of affairs filed by the bankrupt on April 26, 1954, showed that claims of creditors amounted to $26,107.14. (R. 10-27.) Of this amount, a claim in the sum of $13,824.33 was held by relatives of the bankrupt. Claims held by members of the Board of Trade of San Francisco amounted to $4508.67. The statement of affairs also showed that the bankrupt had made an assignment of all his assets to the Board of Trade on December 17, 1953, and that the Board had in its possession $4054.88 belonging to the bankrupt. The assignment mentioned had been taken nominally in the name of Walter J. Hempy the secretary of the said Board. In filing his voluntary petition in bankruptcy the bankrupt necessarily repu-

diated the said assignment and the administration of his assets and affairs by the Board of Trade.

In contemplation of the said meeting of creditors various members of the said Board of Trade as a Creditors' Committee sent out to the creditors of the bankrupt a form letter on the letterhead of said Board of Trade soliciting their cooperation in the selection of a trustee and also soliciting their signatures to a letter of attorney running in favor of Shapro & Rothschild, attorneys for the Committee. (R. 49.) Claims of creditors thus solicited, obtained, and represented were disqualified by the referee and rejected in the vote for trustee, and the appointment of respondent rather than England resulted. (R. 28-30.)

The voluntary petition in bankruptcy was against the wishes of the Board of Trade, the nominal assignee, and the Creditors' Committee. It was not at all improbable that a Board of Trade sponsored trustee would favor those electing him or be subject to influence from them. It was not at all improbable that a controversy over the assets in the Board of Trade might develop, or a controversy over expenses or deductions claimed by the Board. In disqualifying the Board of Trade sponsored creditors, the referee manifestly exercised a sound discretion on equitable grounds. Among the findings of fact and conclusions of law made by the referee in his order appointing respondent trustee, were these:

> "(9) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid

nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(10) That, in the light of all the circumstances, it would not be, nor is it, for the best interest of all the creditors of Alfonso Paul Sanfillipo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled manner. * * *

Because of the state of the record herein and, in the light of all the circumstances shown by said record, the court concludes:

(1) That Kal W. Lines has a majority, both in number and amount of the claims of creditors which are entitled herein to be voted for trustee.

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction." (R. 52-54.)

ARGUMENT.

1. THERE IS NO IMPORTANT QUESTION OF LAW INVOLVED.

The decision of the Court of Appeals is based on the particular facts of the case. It is not a general condemnation of Boards of Trade, Credit Associations, or similar organizations, but is a simple holding that under facts and circumstances calling for the application of equitable principles the referee exercised a sound discretion and applied them. No general principle of law or equity has been overturned. The decision is confined to a specific factual setup, and will not be authority in subsequent cases lacking the same factual setup. What petitioners are apparently seeking by their certiorari petition is to have this Court revise or re-edit the factual setup as the Court of Appeals and the referee conceived it.

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2. THERE IS NO CONFLICT OF DECISION.

The decision of the Court of Appeals is in complete harmony with the cases it cites. Petitioners do not assert the contrary. Their assertion (Pet. p. 5) is that the decision is in conflict with *Garrison v. Pilliod Cabinet Co.*, 10 Cir. 1931, 50 F. 2d 1035. Petitioners are mistaken. There is no conflict. That case *approved* rejection of votes for a trustee solicited by a Credit Association and an assignee. It held (p. 1036) that "a supervisory power over the selection of a trustee is vested in the referee, to be exercised for good cause, in sound discretion". It also held (p. 1036) that "a trustee should not be selected when his posi-

tion may be inconsistent with the rendition of his duties to creditors in bankruptcy". The *Garrison* case, obviously, is in harmony with the present decision rather than in conflict with it.

---

3. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The decision herein is that a court of bankruptcy is a court of equity applying the rules and principles of equity jurisprudence. Petitioners do not and cannot challenge that law. And the decision herein is that a referee in supervising the appointment of a trustee may apply the principles and rules of equity jurisprudence. Again, petitioners do not and cannot challenge that law. The decision herein, furthermore, is that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence and exercise a legal discretion to prevent the election of a trustee sponsored by a group or faction of creditors and an organization of which they were members, where it was not at all improbable that their candidate, if elected, would be subject to influence by the group, faction, or organization sponsoring him, and where it was not at all improbable that disputes over assets of the bankrupt might arise between a trustee and the faction, group, or organization, the latter having possession of all the assets of the bankrupt. Under such circumstances, a referee mindful of his duties, would have no alternative but to do what the referee in this case did, namely, to see that a trustee was appointed who would impar-

tially represent all creditors and be free from influence from any source. And under such circumstances, a court committed to the principles of equity and justice would have no alternative but to do what the Court of Appeals in this case did, namely, affirm the order of the referee. Obviously, the decision of the Court of Appeals is correct.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Dated, San Francisco, California,
September 24, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

MOTION FILED SEP 14 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

—against—

KAL W. LINES,

Respondent.

MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

—against—

KAL W. LINES,

Respondent.

MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Credit Men respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for the petitioners herein has been obtained but the attorney for the respondent herein refuses to consent to the filing of a brief by the National Association of Credit Men as *amicus curiae*.

The question involved is the extent of the power of the court of bankruptcy to disallow the votes of credi-

tors in the election of a trustee in bankruptcy, and specifically whether creditors may be disfranchised merely because their proxies were solicited by a committee of creditors all of whom were members of a trade association to the secretary of which the bankrupt had made an assignment for the benefit of creditors.

The applicant, National Association of Credit Men, has an interest in this case in that the question presented for decision adversely affects the proper functioning of a nation-wide system created by its almost 35,000 members for safeguarding the administration of estates in bankruptcy against fraud and exploitation by persons seeking to advance their own interests as against the interests of general creditors.

The applicant believes that the question for decision is of paramount importance to the business interests of the country and should be reviewed by this Court, and that the argument of the petitioner herein as set forth in the Petition for Certiorari (a) inadequately sets forth the importance of the question presented, and (b) fails to point out the conflict between the decision in the instant case and prior decisions of other courts of equal jurisdiction with respect to the basis upon which the court of bankruptcy may exercise its jurisdiction pursuant to Section 2 (17) of the Bankruptcy Act to disapprove the appointment of trustees by creditors.

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BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS AMICUS CURIAE

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BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS AMICUS CURIAE

Interest of the *Amicus Curiae*

The *amicus curiae,* National Association of Credit Men, is a membership association comprising approximately 35,000 manufacturers, bankers and jobbers throughout the United States, and having affiliated local associations in 128 of the leading cities of the country.

The National Association of Credit Men was organized in 1896, at a time when there was no Bankruptcy Act, for the express purpose, among other things, of urging the enactment by Congress of a National Bankruptcy Act. One of its primary purposes has always been the improvement of bankruptcy administration.

The Association, its members and its affiliated organizations are jealous of the right accorded to creditors by Section 44a of the Bankruptcy Act to elect a trustee of their own selection. Creditors believe that such right is essential to honest and efficient bankruptcy administration, and that any decision which arbitrarily infringes upon such right is a grave threat to the integrity of bankruptcy administration. The Association regards the order of the Court of Appeals for the Ninth Circuit in this case as a dangerous and unwarranted infringement upon creditors' prerogatives in bankruptcy, and that the same is contrary to the spirit and intent of the Bankruptcy Act and in direct conflict with the decisions of other Circuits cited in this brief.

Statutes Involved

Bankruptcy Act, Section 2 (17) (11 U. S. C. A. Section 11 (17)) which provides that the courts of bankruptcy shall have jurisdiction to:

> "(17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;"

Bankruptcy Act, Section 44a, (11 U. S. C. A. Section 72 (a)) which provides:

> "a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed fails to qualify as herein provided, the court shall make the appointment."

Question Presented

Is it within the discretion of the court of bankruptcy to deny to the members of a committee of creditors, none of whom are disqualified from voting by Section 44a of the Bankruptcy Act, the right to vote their own and other claims at the first meeting of creditors for the election of a Trustee in Bankruptcy, merely because as members of a trade association, to the secretary of which the bankrupt had made an assignment for the benefit of creditors, they solicited such claims for voting purposes, at a time when such trade association, or its secretary, had possession, as assignee, of funds belonging to the bankrupt?

Facts

The facts are substantially set forth in the petition for a writ of certiorari (pp. 4-6) and will not be repeated here except as necessary to the argument.

The Opinion Sought to Be Reviewed

The Court of Appeals held that approval or disapproval of the appointment of a trustee in bankruptcy rests in the sound discretion of the Referee, and that if reasonable men could differ as to the propriety of the action taken, there is no abuse of discretion to be reviewed and corrected by the Appellate Court (Petition, Appendix xii).

Reversing the District Judge, the Court of Appeals found that the Referee had acted within the discretion conferred upon him by the Bankruptcy Act in holding that the claims of the members of the Creditor's Committee, and other claims which the Committee had received as a result of a letter soliciting proxies, could not be voted for the election of the trustee in bankruptcy (Ref. Cert. T. R. 53-55). The Referee's Findings, which the Court of Appeals deemed sufficient to support the Referee's action in so disfranchising the creditors, were as follows (Petition, Appendix xiii):

1. That the bankrupt made a general assignment to the Board of Trade of San Francisco.

2. That claims were solicited by a Creditors' Committee (all of whom were members of the Board of Trade) on letterheads of the Board of Trade.

3. That the letter soliciting claims recited that the Creditors' Committee had been appointed at a meeting of the creditors held at the Board.

4. That the secretary of the Board of Trade was the general assignee for the benefit of creditors.

5. That it was the Committee's intention "indirectly to keep if possible some sort of control over the bankrupt's assets."

6. That it would not be "for the best interest of all the creditors to count the claims thus garnered in voting for any candidate for trustee."

"Considered separately", the court said, "none of these Findings might be thought sufficient to support the Referee's holding. * * * Taken together, however, they persuade us that whether we agree with them or not, they are Findings regarding which 'reasonable men could differ as to the propriety of the action taken' " (Petition, Appendix xiii, xiv).

Items 5 and 6 above are based upon the Referee's Findings 5, 8 and 9 for which there is no support whatsoever in the record, as follows:

(a) That the activities of the Creditors' Committee in connection with the assignment for the benefit of creditors and the affairs or property of the bankrupt were as members of the Board of Trade and not merely as creditors of the bankrupt (Ref. Cert. T. R. 51; Finding No. 5).

(b) That Hempy, the assignee for the benefit of creditors, performed his functions as such not as assignee on his own behalf but as secretary of the Board of Trade, and on behalf of the Board of Trade and its membership (Ref. Cert. T. R. 52; Finding No. 8).

(c) That it was the Committee's intention indirectly to keep, if possible, some sort of control over the bankrupt's assets (Ref. Cert. T. R. 52, 53; Finding No. 9).

The Referee refused to permit the attorney for the Committee to introduce evidence explaining the circumstances under which the assignment for the benefit of creditors was made, the Committee organized, the letter to creditors written and dispatched, the relationship between the Creditors' Committee and the Board of Trade, and other facts bearing upon the question of disqualification (T. R. 31-39).

Despite the exclusion of this proof and the absence of any other basis besides conjecture and unsupported inferences, the Court of Appeals held that "in disqualifying *Board-sponsored* creditors, the Referee exercised a sound discretion." (Italics ours. Petition, Appendix xvi.) Such holding could have been based only on the assumption, unsupported by proof, that because the members of the Creditors' Committee were members of the Board of Trade, they were "*sponsored*" by the Board of Trade, and thus were acting for the assignee for the benefit of creditors.

The candidate for trustee for whom the Creditors' Committee sought to vote was a wholly disinterested person having no connection with the Board of Trade and admittedly qualified (T. R. 54; Finding No. 14).

The decision of the Court of Appeals that creditors may be disfranchised upon the basis of unsupported inferences is to emasculate the provisions of Section 44a of the Bankruptcy Act and to make a mockery of the creditor's right to elect a trustee. The decision is directly contrary to the decisions of other Courts of Appeals cited in this brief which hold, without exception, that the Referee's power of disapproval may be exercised only upon the basis of a record showing that the candidate for trustee has interests

which conflict with those of general creditors or is otherwise a person unfit for the office, and only for "substantial reasons", and "for just cause". *In re Leader Mercantile Co.,* 36 F. (2d) 745 (C. C. A. 5); *In re Mayflower Hat Co.,* 65 F. (2d) 330 (C. C. A. 2); *Beale* v. *Snead,* 81 F. (2d) 970 (C. C. A. 4); *In re Merritt Construction Co.,* 219 F. 255 (C. C. A. 2); *In re Harris Construction Co.,* 37 F. (2d) 951 (D. C. Penn.); *In re Allied Owners' Corp.,* 4 Fed. Supp. 684 (D. C. E. D. N. Y.).

POINT I

The decision in this case is of paramount importance to the business interests of the country in that it strikes a crippling blow at the nation-wide system established by creditors to provide responsible administration for the estates of bankrupt businesses.

It is clear that the court in a proper case and for sufficient reasons may disapprove the person selected as trustee by the creditors, or refuse to allow creditors to vote where they have solicited claims in the interest of the bankrupt or of some interest adverse to that of general creditors. *In re Mayflower Hat Co.,* 65 F. (2d) 330. Such power of disapproval was originally embodied in General Order 13, since repealed, and incorporated into the Bankruptcy Act in 1938 as subdivision (17) of Section 2.

The right of creditors to elect a trustee is clearly and affirmatively set forth in Section 44a of the Bankruptcy Act, and that section enumerates certain classes of creditors who alone are not entitled to vote. It is not contended that any of the creditors here disfranchised were within the inhibited classes.

Concerted action for the election of a trustee is obviously necessary, for otherwise no candidate would secure the necessary majority of votes. Where creditors are scattered, as in most commercial bankruptcies, the right of creditors to organize, and to solicit proxies for the election of a trustee is their sole protection against persons seeking to control the election for improper purposes.

As stated in *2 Remington on Bankruptcy,* Section 1079:

> "It is clearly intended by the Bankruptcy Act that creditors should act in concert—not necessarily separately in each case, but also in permanent organizations in each trade or in permanent associations of credit men in several trades—to protect the credit system from the evil machinations of those who would take advantage of a business failure to perpetrate frauds or preferences; and such organizing, equally as clearly, implies the solicitation of claims so that the creditors may protect it in the instant case; so, it is not the fact of the solicitation of claims that is important, but the object for which they are solicited; if solicited in the interest of the bankrupt, or of some preferred creditor, who desires inaction rather than action, or solicited for some other sinister object, the discretion of the bankruptcy court to disapprove the choice, which is of course a judicial discretion if exercised in accordance with legal principles, would be proper; but where the solicitation is for the purpose of putting those in charge of the administration who will expose fraud and protect the estate, such solicitation should not be disapproved but

should be approved as tending to encourage creditors in that participation in bankruptcy administration which the law clearly intended should be encouraged."

The Board of Trade of San Francisco is one of a nation-wide system of organizations established by the local associations of credit men affiliated with the National Association of Credit Men and having its counterpart in 53 of the other leading commercial centers of the United States, which creditors have set up for the express purpose of insuring proper functioning of the system of creditor-control of elections which the Bankruptcy Act contemplates and provides for.

These organizations usually called "Adjustment Bureaus" (but in San Francisco and Los Angeles called "Boards of Trade", and hereafter in this brief referred to as "Bureaus") maintain staffs of highly skilled employees trained to assist creditors in insolvency cases and designed to minimize expenses and promote honest and efficient administration.

Debtors who find themselves in financial difficulties are encouraged by their creditors to bring their problems to these Bureaus at as early a stage as possible. The usual procedure is to call a meeting of creditors at the Bureau's office, at which time the creditors present elect a committee and select an attorney to represent them.

Where the machinery of investigation provided by the Bankruptcy Act is not needed, the debtor often (as in this case) puts his affairs in the hands of his creditors by making a common-law or statutory as-

signment for the benefit of creditors to a representative of the Bureau, or agrees with his creditors upon a simple extension of time for payment, continuing to operate his business meanwhile under the supervision of the committee and with the assistance of the trained staff of the Bureau.

If fraud is found or suspected, or voidable preferences have been given by the debtor, or if all creditors will not cooperate, the protective cloak of bankruptcy is invoked by asking the debtor to file a voluntary petition in bankruptcy, or the committee arranges for the filing of an involuntary petition. Thereafter the committeee, using the clerical assistance afforded by the Bureau, solicits the proxies of all creditors for the election of a suitable person as trustee.

It was this procedure that was followed in the case here sought to be reviewed:

(a) The debtor put his affairs in the hands of his creditors by making an assignment for the benefit of his creditors to the secretary of the Board of Trade (T. R. p. 46; Finding 1).

(b) A general meeting of creditors was held at the Board of Trade (T. R. 79) and a Committee, all of whom were members of the Board of Trade, elected (T R. p. 30).

(c) A voluntary petition in bankruptcy was filed by the debtor (T. R. p. 47).

(d) The Committee solicited proxies from all creditors, using the clerical facilities of the Board of Trade to prepare and mail the letter of solicitation with which was enclosed a form of proof of claim and power of attorney running to the attorneys for the committee (T. R. pp. 47, 51).

(c) The Committee's attorneys attempted to vote the claims thus received (constituting the statutory majority) for a candidate for trustee having no connection whatever with the Board of Trade, and admittedly qualified (T. R. 54; Finding 14).

On this state of facts the Referee held that the creditors who had given their proxies to the Committee's attorneys were disqualified to vote, because, he said:

(a) "That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul Sanfilippo, after the making, by said Alfonso Paul Sanfilippo, of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul Sanfilippo" (Ref. Cert. T. R. 51; Finding 5); and

(b) "That in causing to be prepared and sent out, the aforesaid letter and each of the aforesaid nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade" (Ref. Cert. T. R. 52; Finding 9).

For these Findings there was not a shred of evidence. Indeed when the attorney for the committee offered to prove the facts and circumstances attending the preparation and mailing of the committee's letter

to creditors and the committee's relation to the Board of Trade, the Referee denied the offer of proof (T. R. pp. 30, 31)!

On review the District Judge reversed, on the ground that there was no proper basis for disfranchising the creditors—nothing in the record to sustain the Referee's action.

In his opinion the District Judge said with respect to the foregoing:

> "From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him. Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of a trustee by creditors * * *. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors" (T. R. 84).

The Court of Appeals however reversed the District Judge, and, basing its opinion on an alleged lack of abuse of discretion on the part of the Referee, held that, regardless of the proof sought to be offered by the Committee's attorney, the Committee was "Board-sponsored" (Petition, Appendix xvi), and was, there-

fore, presumably acting in the interests of the Board of Trade,—or of the assignee,—just which is not clear from the opinion.

Whatever may have been the theory, the net effect of the decision of the Court of Appeals is simply this: *A creditors' committee consisting of members of a credit organization, to the secretary of which an assignment for the benefit of creditors has been made, cannot vote for the election of a trustee however qualified and disinterested he may be.*

Thus a blow has been struck against the very agencies creditors have established to rid bankruptcy administration of the racketeer and the plunderer.

Because this decision affects the interests of almost 35,000 of the leading commercial and banking houses of the United States as represented in the nation-wide system of Adjustment Bureaus affiliated with the National Association of Credit Men, such Association urges that this decision be reviewed.

POINT II

The holding that creditors may be disfranchised on grounds not sustained by the record is an abuse of discretion and in direct conflict with decisions of the Courts of Appeals of other circuits.

The record in this case before the Referee consisted exclusively of the following:

1. The bankrupt's statement of affairs showing that he had made an assignment for the benefit of creditors to [the secretary of] the San Fransisco Board of Trade and "that at the time of

the filing of the petition in bankruptcy there was the sum of $4,054.88 held by the Board of Trade of San Francisco" (T. R. 13).

2. That at the first meeing of creditors 20 claims, aggregating in excess of $4,500, were voted for one John M. England as trustee, and that four claims, totaling approximately $500, were voted for Kal W. Lines as trustee (T. R. 28).

3. That the claims voted for Mr. England were solicited by the members of a creditors' committee and that all members of the creditors' committee were members of the Board of Trade (T. R. 29, 30).

4. That the letter by the creditors' committee soliciting claims was written on the letterhead of the Board of Trade of San Francisco (T. R. 49).

5. That the creditors' committee enclosed with its letter of solicitation, forms of proof of claim and power of attorney from which the name of the attorney for the San Francisco Board of Trade had been stricken out and the names of other and independent attorneys substituted (T. R. 51, 52).

Without any supporting proof the Referee found:

(a) that Walter J. Hempy, the assignee for the benefit of creditors, acted "not as an assignee on his own behalf but as the secretary of said Board of of Trade" (Ref. Cert. T. R. 52; Finding 8);

(b) that "it was the intent, on the part of such Creditors' Committee, acting for said Board of Trade, indirectly to keep if possible, some sort of control

over the assets of the estate of the above named bankrupt, * * *" (Ref. Cert. T. R. 53; Finding 9).

It has been established by the Courts of Appeals of other Circuits that creditors may not be disfranchised except for good cause, *supported by an adequate record,* which was here entirely lacking.

Thus *In re Hale Desk Co.,* 89 F. (2d) 1, the Circuit Court of Appeals for the Second Circuit, on the authority of *In re Mayflower Hat Co., supra,* that "for disapproval of a proxy, solicitation must have been intended to further the interest of the bankrupt or any interest alien to those of general creditors", held that it was improper for the court to disallow the votes of a majority of the creditors where the evidence supporting the claim of improper solicitation consisted mainly of the fact that some of the claims were received or obtained by a corporation managed and controlled by the bankrupt, the court said:

> "But that does not necessarily prove that the bankrupt's interests were being furthered, and may merely show that the bankrupt was cooperating with his creditors. *The Referee should have obtained further proof."* (Italics ours.)

And where the Referee had rejected the vote of a creditor on suspicion that he had obtained an unlawful preference, the court said:

> "If there was any basis for the suspicion entertained by the Referee, *he should have undertaken to obtain facts* which under Section 57g of the Bankruptcy Act, 11 U. S. C. A. 93 (g), would have warranted the disallowance of the claim. It did not justify the denial of the right to vote

a claim which was prima facie valid under Section 57a (11 U. S. C. A. 93 (a)). *In re Bronx Ice Cream Co.*, 66 F. (2d) 620 (C. C. A. 2). *If the Referee was informed of facts, as he stated, which he unearthed in an ex parte investigation conducted at the suggestion of the senior district judge, he should not have permitted such information to influence his judgment.*" (Italics ours.)

Again, where the Referee had rejected the vote of a liquidated claim for rent because it would have to be "vigorously fought" and because of facts uncovered by the Referee in the investigation but unrevealed to the creditor or to the court, the court said:

> "The extent to which claims should be established before the election of a trustee may present a troublesome question * * *; but that does not mean that a claim, clearly prima facie valid, may not be voted because of supposed but undisclosed questions which might arise later in connection with the claim."

In *In re Bay Parkway Haberdashers and Hatters, Inc.*, 59 Fed. (2d) 103, where the Referee had declined to certify the election as trustee because the candidate's election was allegedly controlled by the attorneys for a prior assignee for the benefit of creditors, the Circuit Court of Appeals for the Second Circuit reversed *on the ground that the record did not support the conclusion of the Referee* that the disqualified candidate was in fact controlled by the assignee's attorneys. The court said:

> "by statute the unqualified right to appoint trustees in bankruptcy rests in the creditors * * *. Disapproval or removal must be based upon the

> exercise of wise judicial discretion. There must be reason for approval or disapproval. *In re Mayflower Hat Co.*, 65 F. (2d) 330 (C. C. A. 2). Insufficient reason existed here for refusing the appointment of Olsen as trustee."

See also *In re Kutcher*, 69 F. (2d) 104 (C. C. A. 2); *Wilson* v. *Continental Building & Loan Assn.*, 232 F. 824 (C. C. A. 9); *Sheinberg* v. *Hoffman*, 236 F. 343 (C. C. A. 3).

In *In re Paramount Publix Corp.*, 68 F. (2d) 703, cert. denied, 292 U. S. 652, the Circuit Court of Appeals for the Second Circuit said with respect to the exercise of the discretionary power to approve or disapprove a candidate for trustee:

> "*He must permit a disclosure of facts upon which the exercise of discretiaon must be based before he can properly approve the trustee and, to be sustained, the record before him must show a basis for the exercise of sound discretion.*" (Italics ours.)

As established by the foregoing decisions, and by the cases cited in the Petition (pp. 11-16), the decision of the court in the instant case is contrary to a long line of authorities holding that approval or disapproval of the creditors' choice of trustee must be for reason, and *must be based upon facts supported by the record.*

The decision in this case, we submit, was not based upon the exercise of such sound judicial discretion and upon such proof as the authorities cited have invariably deemed essential.

POINT III

The decision in this case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Garrison* v. *Pilliod Cabinet Company*, 50 F. (2d) 1035.

The decision in this case, so far as it holds that claims may not be voted where solicited by a trade association, to an employee of which an assignment for the benefit of creditors had been made by the bankrupt, directly conflicts with the decision of the circuit Court of Appeals for the Ninth Circuit in *Garrison* v. *Pilliod Cabinet Company* (50 Fed. (2nd) 1035).

In that case Mr. Garrison, the manager of the Wichita Association of Credit Men (an organization affiliated with the National Association of Credit Men) held a trust mortgage on the debtor's assets, which was equivalent to a common-law assignment for the benefit of creditors. A petition in bankruptcy was filed against the trust mortgagor, and Garrison caused the National Association of Credit Men to send a letter to creditors asking them to send their claims to the Wichita Association so that the Association might control the administration of the estate. When the Wichita Association attempted to vote the claims for Garrison as trustee, objection was raised on the ground that the claims had been solicited by the Association while Garrison was assignee and that such solicitation was prohibited by General Order 39 (11 U. S. C. A., Section 53), which in terms prohibits a receiver or his attorney from soliciting "any proof of debt, power of attorney, or other authority

to act for, or represent any creditor for that purpose. * * *"

The Circuit Court of Appeals held that the General Order had no application and should not be extended to assignees or to other parties not actually named. The court said:

> "It is said the solicitation of claims by a party disqualifies it to act as trustee. We think this fact alone is an insufficient test to be applied, without an inquiry into other considerations, *affecting the fitness of the applicant.*" (Italics ours.)

While holding that the claims might not properly be voted for Garrison as trustee, in view of the fact that he was the assignee for the benefit of creditors, the court overruled the objections based upon the Association's solicitation of claims while its employee was the assignee for the bankrupt's creditors.

In the instant case the claims were not solicited by the Board of Trade, to the secretary of which the assignment for the benefit of creditors was made, but rather by a Creditors' Committee which had no established connection with the assignee for the benefit of creditors except the fact that they were members of the Board of Trade. They did not seek to vote the claims for any representative of the Board of Trade but for a disinterested and fully qualified stranger.

In the absence of evidence supporting the Referee's and the Court of Appeals' inferences of an improper connection between the creditors and the assignee, we submit that there was no basis upon which (to

paraphrase the language of the Court of Appeals) any reasonable man could arrive at the conclusion that the discretion of the Referee was properly exercised.

Conclusion

For the reasons above stated, we believe that without any substantial reason the statutory right of creditors to elect a trustee of their own choosing has, in this case, been arbitrarily denied, and that the decision is of such far reaching importance to the business interests of this country that it should be reviewed and reversed by this Court, and that the order of the District Court reversing the Referee (T. R. pp. 79 to 85) should be affirmed.

Dated: New York, N. Y.
September 11, 1956.

Respectfully submitted,

W. Randolph Montgomery
Attorney for National Association of Credit Men, as Amicus Curiae

FILED
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JOHN T. FEY, C

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OF THE

United States

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Respondent.

OBJECTION TO MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

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Counsel for Respondent

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF NATIONAL ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

Respondent Kal W. Lines objects to the motion for leave to file brief as *amicus curiae*, and withheld con-

sent to the filing thereof, for the following and each of the following reasons:

1. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.**

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound legal discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

---

2. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.**

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the amicus curiae brief as well as the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

---

3. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.**

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT SHOW INADEQUACY OF PRESENTATION BY THE PETITIONERS.

The proposed amicus curiae brief is virtually a rubberstamp of the petition, and relies upon the same cases. Realistically viewed, it adds little more than that other Boards of Trade or Credit Associations are willing to add their weight to petitions for certiorari sponsored by one of their members. The motion to file should be denied because there is no inadequacy in presentation by the petitioners for certiorari.

Wherefore, respondent respectfully submits that the motion of National Association of Credit Men for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
September 24, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

MOTION FILED SEP 25 1956

IN THE

Supreme Court of the United States

October Term, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

Motion of Credit Managers Association of Southern California for Leave to File Brief as Amicus Curiae and Brief.

THOMAS S. TOBIN,
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Petitioners,

vs.

KAL W. LINES,

Respondent.

Motion of Credit Managers Association of Southern California for Leave to File Brief as Amicus Curiae.

The Credit Managers Association of Southern California respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.*

The consent of the Petitioners herein has been obtained but the Respondent herein refuses to consent to the filing of a brief by the Credit Managers Association of Southern California as *amicus curiae.*

Interest of Within Petitioner.

The Credit Managers Association of Southern California is vitally interested in the within proceeding.

The Credit Managers Association of Southern California is a non-profit organization consisting of approximately sixteen hundred wholesalers, distributors, banks and creditor interests in Southern California with its headquarters at Los Angeles. It is affiliated with the National Association of Credit Men.

For more than fifty-five years the Credit Managers Association of Southern California (and its predecessor in name, the Los Angeles Wholesalers Board of Trade) has been vitally interested in serving creditors in its area.

It and its companion non-profit creditor organizations have received the recognition and commendation of the bankruptcy court in this area upon numerous occasions for its said services.

The United States Court of Appeals for the Ninth Circuit (*In re Christ's Church of the Golden Rule*, 165 F. 2d 1007) reversed the Order of the Referee and the affirming Order of the District Judge. The Referee had determined that the attorneys proposed to be employed by the trustee had an adverse interest because the manager of the bankrupt had advised creditors to place their claims in the hands of the Los Angeles Board of Trade, thus bringing about the contended disqualification of said attorneys to act as attorneys for the trustee. In reversing the Referee and the District Judge, the opinion at page 1009 refers to the Association as *"a body long serving creditors in insolvencies and bankruptcy proceedings."* (Emphasis ours.)

In recognizing the rights of creditors in non-statutory or common law Assignment for Benefit of Creditors, one of the principal functions of the Association, the Supreme Court of the State of California said, in *Brainard v. Fitzgerald*, 3 Cal. 2d 157, at page 163:

> "we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith, for the benefit of creditors generally. Experience has shown that this practice has much to commend it."

The Credit Managers Association of Southern California now is and always has been vitally interested in bringing about the participation of individual creditors in bankruptcy and insolvency proceedings. In connection with these debtor-creditor matters with which it concerns itself it encourages the creditors to attend the court examinations, to serve upon the Committees of Creditors, to report matters of violations or fraud on behalf of the bankrupt, to the bankruptcy court, etc. It also encourages creditors to cooperate with the bankruptcy administration in blocking the discharge of the dishonest bankrupt.

However, the first order of importance in this creditor participation is the assertion of the right granted by Congress to creditors to bring about the selection and election of the creditors' designated trustee.

Relevant Facts and Questions of Law Which Petitioner Believes Have Not Been Fully Presented.

The question here presented between a group of creditors and the individual who has been declared elected trustee is of vital importance to all creditor organizations. One of the principal functions of the association is the service rendered its members through organization of its

members in bankruptcy proceedings. The present decision could have far reaching effects in the creditor world.

One or two creditors, prompted by an opportunist, job seeking, claim soliciting individual, seeking to have himself elected as trustee, could have the claims of all of the other creditors disqualified and disenfranchised merely by a showing (as here) that they belonged to a creditor organization.

The Petition of present Petitioners filed with the Court does not adequately set forth the basic question as pertains to Credit Associations and likewise does not set forth the conflict between the decision and prior decisions of the same and other courts of equal jurisdiction and likewise does not give consideration to the 1938 Amendment to Sections 2a (21 and 70a (8)) which give complete jurisdiction to the bankruptcy court over Assignees and Assignments for the Benefit of Creditors which are voided by the filing of bankruptcy within four months.

It is respectfully submitted that neither the facts nor the law have been adequately presented to this Honorable Court upon this subject of the creditor "disqualification by Association" and the Petitioner here sincerely believes that the matters set forth in its accompanying brief bears a direct and necessary relevancy to the case.

THOMAS S. TOBIN,

Attorney for Credit Managers Association of Southern California.

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

Brief of Credit Managers Association of Southern California as Amicus Curiae.

Interest of Amicus Curiae.

The Credit Managers Association of Southern California is an affiliate of the National Association of Credit Men and is a nonprofit organization, the members of which comprise over sixteen hundred of the principal suppliers, wholesalers, distributing concerns, banks and other commercial institutions in Southern California. Its opera-

tions and activities are directed by its Board of Directors selected from its membership.

One of the most important services and functions of the Credit Managers' Association of Southern California is rendered in connection with the bankruptcy proceedings in which its members are involved. In bankruptcy proceedings in Southern California, when it finds a number of its members involved as creditors in any particular case, the Association notifies the creditors of the pending bankruptcy proceeding; that members of the Association are involved, and requests that their claims in the bankruptcy be filed along with those of the members of the said Association. The claims so received and so filed are voted in the interests of creditors, for a trustee, for a Creditors' Committee, for the approval or rejection of a Plan of Arrangement under Chapter XI or Plan of Reorganization under Chapter X, or in any other proceeding or matter wherein the creditors have the right of control through their collective action.

The Credit Managers' Association of Southern California has played a vital part in bankruptcy administration in this area. It has been constantly diligent in its efforts to improve bankruptcy administration, to safeguard the rights of creditors and bring about the prosecution of dishonest and fraudulent bankrupts.

It and its companion nonprofit creditor organizations have received the recognition and commendation of the bankruptcy court in this area upon numerous occasions for its said services.

The Credit Managers Association of Southern California now is and always has been vitally interested in bringing about the participation of individual creditors in bankruptcy and insolvency proceedings. In connection with these debtor-creditor matters with which it concerns itself, it encourages the creditors to attend the court examinations, serve upon the Committees of Creditors, report matters of violations of the Bankruptcy Act or fraud on behalf of the bankrupt to the bankruptcy court, etc. It also encourages creditors to cooperate with the bankruptcy administration in blocking the discharge of the dishonest bankrupt.

The first order of importance in this creditor participation is the assertion of the right granted by Congress to creditors to bring about the selection and election of their own designated trustee.

Statute Involved.

The right of creditors to elect their trustee in bankruptcy; Bankruptcy Act, Section 44a (11 U. S. C. A. Sec. 72a) provides:

> "a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of a trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee appointed fails to qualify as herein provided, the court shall make the appointment."

The jurisdiction of the bankruptcy court (referee) in connection therewith:

Bankruptcy Act, Section 2(17) (11 U. S. C. A. Sec. 11(17)) provides that the courts of bankruptcy shall have jurisdiction to:

> "(17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;"

Question Presented.

CAN MEMBERSHIP BY CREDITORS IN MUTUAL CREDITOR'S ORGANIZATION PER SE AND WITHOUT SHOWING OF FRAUD, OPPRESSION OR UNFAIR DEALING OF ANY KIND, DISQUALIFY SUCH MEMBERS IN VOTING FOR A TRUSTEE IN BANKRUPTCY PROCEEDINGS?

The basic policy of the National Bankruptcy Act provides for creditor control and the question presented is whether a large segment of creditors can be prevented from participating in such creditor control, merely because they are members of a credit organization, without any showing of fraud, oppression or unfair dealings of any kind on their part and without showing that the trustee of their choice is either disqualified under the provisions of Section 44 and/or will not administer the bankrupt estate fairly and impartially.

Determination of Referee—of the United States District Judge—of the United States Court of Appeals for the Ninth Circuit.

The Referee in the instant bankruptcy proceeding rejected the election by the majority of creditors voting, although it was admitted that the rejected trustee would administer the estate "impartially, fairly and accurately."

Upon review the United States District Judge (130 Fed. Supp. 312) reversed the Referee's Order. The Judge carefully reviewed the action of the Referee. He stated, far better than we can, what we believe to be the lack of legal support for the creditor disqualification (p. 315):

> "Petitioners are not within any of the classes of creditors that are excluded by Section 72 from taking part in the selection of a trustee. In view of this fact, and in view of the fact that petitioners' nominee for trustee is conceded to be competent, fair and impartial, there must be the most compelling reasons for disenfranchising the great majority of the creditors in favor of a small minority of them. The reason given by the referee is that petitioners' votes represented an attempt by petitioners to retain *'some sort of control'* over the bankrupt estate for the benefit of the Board of Trade. . . .
>
> "From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditor is under no such alleged disability except through the creditors who propose him. . . ."

The Judge then reflects the fears of the organized creditor world and points out:

> "Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.
>
> "No exact precedent has been cited for the action here taken by the referee."

Upon appeal to the United States Court of Appeals for the Ninth Circuit, the Order of the United States District Judge was reversed and the Order of the Referee affirmed. *Kal W. Lines, Appellant v. Falstaff Brewing Co., et al., Appellees,* 233 F. 2d 927, and on page 933 under the title heading:

> "7. Since 'Reasonable Men Could Differ as to the Propriety of the Action Taken' by the Referee, It Cannot Be Said That He Abused His Discretion."

said in part:

> "that the Referee found *as a fact* that it was the Committee's intention 'indirectly to keep, if possible, some sort of control' over the bankrupt's assets":

This is a most serious charge, if supportable. Such interference with bankruptcy administration, if shown *in any manner to be actual as opposed to fancied,* would be most reprehensible to all those who have the welfare

of bankruptcy and its honest and efficient administration at heart.

Do the referee and the Appellate Court imply that this well known and long standing credit organization, as the holder of funds received under an Assignment for Benefit of Creditors (for all creditors—not only its members) was "about to" defy the Bankruptcy Act and the court and "about to" refuse to comply with the mandatory provision of Section 70a(8) or Section 2a(21)? Charges of this tenor should not be by shadowy suggestion. And, especially so when they are used by the referee as the sole ground in support of his discretion which he exercised in the disenfranchisement of creditors' rights.

Upon being confronted by this perplexing charge, most certainly a secondary inquiry should be made. Wherein does the record support the referee's finding that it was the Committee's intention "indirectly to keep, if possible, some sort of control over the bankruptcy assets"? Did the referee at that time have any knowledge, not reflected by the record, that there was an attempt "about to be made" or "threatened"?

Was the referee fearful that his jurisdiction and power under Section 2a(21) and Section 70a(8) was about to be challenged by this Committee of Creditors or the creditor organization? The record does not appear to contain any support for such apprehension.

Upon bankruptcy the assignee must account to the bankruptcy court, which has sole jurisdiction, not only as to property in the assignee's possession, but also of his fee and likewise it can approve or disapprove every disbursement made by him. After the amendment of 1938, where an Assignment for the Benefit of Creditors

was voided by bankruptcy, the status of the assignee (whether statutory or nonstatutory) was almost identical with that of a receiver appointed by the bankruptcy court. Their compensation was fixed by the bankruptcy court and they both account to the bankruptcy court, which has sole jurisdiction to approve their respective accounts. Having in mind that the referee was vested with this power and exclusive jurisdiction, what were those fears of the referee?

The charge is of such serious import that it should be supported by at least some evidence. Had there been any intimation that the Board of Trade of San Francisco or the assignee had defied the power or authority of the bankruptcy court or had refused to turn over assets or to account to the bankruptcy court, then we would have something upon which the referee could have firmly based such a fear as he expressed.

There is nothing whatsoever in the record to support the fear of the referee that such acts of control were imminent.

The United States District Judge in his written opinion referred to hereinabove aptly expressed the point we are endeavoring to make here, to wit:

> "The Referee attempts to torture some adverse or conflicting interest or prejudicial association which would disenfranchise."

The district judge correctly points out that: "The mere fact that these same creditors were members of a trade association should not, without more, operate to disqualify the voices of a great majority of creditors."

Disqualification of Trustee Proposed by Creditor Must Be for Substantial Reasons, for Just Cause and Not by Unsupported Inferences.

The petitioners have cited the principal reported cases on this particular point and we will not quote therefrom other than to call particular attention to the following cases:

In the Second Circuit:

In re Mayflower Hat Co., 65 F. 2d 330;

Hale Desk Co., 89 F. 2d 1;

In re Bronx Ice Cream Co., Inc., 66 F. 2d 620;

In re Paramount Publix Corporation, 68 F. 2d 703.

In the Fourth Circuit:

Beale v. Snead, 81 F. 2d 970.

Assignment for Benefit of Creditors.

Prior to the amendment to Section 2a(21) and Section 70a(8) giving jurisdiction of the Bankruptcy Court over assignees holding property under Assignments for Benefit of Creditors, where bankruptcy follows within four months, there might have been a basic justifiable fear or suspicion that an assignee might prove to be a person who might have adverse interests to the bankrupt estate. However, since the amendment, his status is almost the same as a receiver appointed in the bankruptcy proceeding. He must account fully and his fee is allowed by the bankruptcy court. His interest is no more adverse than that of the bankruptcy receiver. The creditors did not vote for the assignee as trustee, but there should be no legal impediment in his being elected trustee in the same manner as the receiver can be elected trustee. In fact, as a matter of efficiency and economy, experience

has shown that the assignee is the most logical trustee to continue and conclude the liquidation and administration of the bankrupt estate under the orders of the referee.

We make the above observations in an attempt to demonstrate that the Assignee for the Benefit of Creditors is not one, "*per se*," adverse to the bankruptcy estate and is not and should not be disqualified to act as the trustee of a bankruptcy estate if he is elected and not otherwise disqualified. The petition of the original petitioners filed with the court herein does not give adequate consideration to the change in the status of an Assignee for the Benefit of Creditors in subsequent bankruptcy proceedings which are voided by the filing of bankruptcy within four months.

Conflict in Decisions of Circuits.

The decision in this case establishes a precedent in its determination that claims solicited by or through a credit trade association cannot be voted for an impartial trustee.

In the decision of the United States Court of Appeals for the Tenth Circuit of *Garrison v. Pilliod Cabinet Co., et al.*, 50 F. 2d 1035, the charge was made that a credit trade association of which the assignee was manager could not solicit claims under General Order 39, which in terms prohibits a receiver or his attorney from soliciting proofs of debt, etc. The court there said at page 1036:

> "An objection was made to the voting of the twenty-six claims on the ground that they had been solicited by Garrison while assignee, in violation of general order 39 (11 U. S. C. A. Section 53), which in terms prohibits a receiver or his attorney from soliciting 'any proof of debt, power of attorney, or other authority to act for, or represent any creditor for any purpose. . . .' The objection was sustained.

"The District Court affirmed that decision, holding both that the restrictions of the general order applied and that Garrison was not a proper person to act as trustee because of the prior assignment.

"Counsel for appellant insists that the general order has no application and should not be extended to assignees. We agree that it is inapplicable. It is suggested that a like reason exists for applying the restriction to assignees. But the rule, expressed in plain language, cannot be extended to parties not actually named. There is no room for interpretation beyond its terms. . . ."

The assignee was rejected as trustee, but for other reasons. In the instant case now before the court, the trustee, whom the majority of creditors sought to elect, was not the assignee and was admittedly *competent, fair and impartial.*

The important points here are that (1) the solicitation by the trade association is not improper or prohibited and (2) its nominee for trustee should be approved unless an inquiry *"into other considerations affecting the fitness of the applicant"* shows him to be disqualified.

It is significant that this later decision was rendered June 15, 1931, and prior to the amendment of 1938 when Assignments for Benefit of Creditors within four months of bankruptcy, and the assignee were placed upon the same foundation as receivers in bankruptcy with full power and jurisdiction in the bankruptcy court to require property to be turned over, approve accounts, fix fees, etc.

The case of *Garrison v. Pilliod Cabinet Co.* is quoted with approval in the case of *Rinderknecht v. Toledo Association of Credit Men*, 13 Fed. Supp. 555, D. C. N. D. Ohio (U. S. District Judge Killits) and in reference to

the service rendered by creditor organizations said, at page 557:

> "The usefulness of such an institution functioning honestly in promoting the threefold object of the law just referred to is obvious to any District Judge of much experience. . . .
>
> "Any agency which may serve to stiffen a critical attitude in creditors, individually or collectively, and to encourage an effort to aid the referee or court to reach the result which the law contemplates, deserves sympathetic consideration. We think that a presumption is justifiable that such an association, with nationwide co-operating connections, will function reasonably and with a fair degree of disinterestedness. . . ."

It is respectfully submitted that neither the facts or the law have been adequately presented to this Honorable Court upon this subject of "disqualification by association" and the petitioner here sincerely believes that the matters as set forth in the within brief bear a direct and necessary relevancy to the case.

THOMAS S. TOBIN,

Attorney for Credit Managers Association of Southern California.

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JOHN T. FEY, C

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Petitioners.

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA TO FILE BRIEF AS AMICUS CURIAE.

MAX H. MARGOLIS,
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Counsel for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Petitioners,

vs.

KAL W. LINES,

Respondent.

OBJECTION TO MOTION OF CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA TO FILE BRIEF AS AMICUS CURIAE.

Respondent Kal W. Lines objects to the motion for leave to file brief as *amicus curiae*, and withheld con-

sent to the filing thereof, for the following and each of the following reasons:

1. THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

---

2. THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the amicus curiae brief as well as the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

---

3. THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT SHOW INADEQUACY OF PRESENTATION BY THE PETITIONERS.

The proposed amicus curiae brief is merely a restatement of the petition. It relies upon the same cases, but adds and stresses *In re Christ's Church of the Golden Rule*, 9 Cir. 1948, 165 F. 2d 1007, which involved selection of special attorneys by a trustee and not the election of a trustee. It demonstrates what respondent sensed when consent to file the brief was withheld, namely, that other Boards of Trade or Credit Associations are eager to add their weight to petitions for certiorari sponsored by one of their number, even though, as here, there is no inadequacy of presentation by the petitioners.

Wherefore, respondent respectfully submits that the motion of Credit Managers Association of Southern California for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
October 4, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

SEP 24 1956

JOHN T. FEY, Cle

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OCTOBER TERM, 1956

No. 364

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

MOTION OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

FREDERICK P. CRANSTON
Attorney for Rocky Mountain Association of Credit Men
Office and Postoffice Address
409 Equitable Building
Denver 2, Colorado

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

Petitioners,

vs.

KAL W. LINES,

Respondent.

BRIEF OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae*, Rocky Mountain Association of Credit Men, is an association comprising approximately 475 members, being chiefly wholesalers, manufacturers, bankers, jobbers and finance companies in Colorado and in other states, comprising in general the area known as "the Denver trade territory".

The Rocky Mountain Association of Credit Men has as one of its primary purposes the improvement of bankruptcy administration. Its members are jealous of the right accorded to creditors by 11 U.S.C.A. Sec. 72a (Bankruptcy Act Section 44a) to elect a trustee of their own selection. Creditors believe that such right is essential to honest and efficient bankruptcy administration, and that any decision which arbitrarily infringes upon such right is a grave threat to the integrity of bankruptcy administration. It regards the order of the Court of Appeals for the Ninth Circuit in this case as a dangerous and unwarranted infringement upon creditors' prerogatives in bankruptcy, and that the same is contrary to the spirit and intent of the Bankruptcy Act and in direct conflict with the decisions of other Circuits cited in this brief.

ADOPTION OF PORTIONS OF BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS *AMICUS CURIAE*

The Rocky Mountain Association of Credit Men as *amicus curiae* adopts the portions of Brief of National Association of Credit Men as *amicus curiae* beginning with the heading "Statutes Involved" on page 2 thereof and continuing to but not including the heading "Conclusion" on page 20 thereof.

ADDITIONAL COMMENT ON POINT III OF BRIEF OF NATIONAL ASSOCIATION OF CREDIT MEN AS *AMICUS CURIAE*

The Rocky Mountain Association of Credit Men has an additional interest in sustaining the rule stated in the decision of the Circuit Court of Appeals for the Tenth Circuit in *Garrison vs. Pilliod Cabinet Company*, 50 Fed. (2d) 1035, for the reason that the operations of the Rocky Mountain Association of Credit Men are conducted largely within the

Tenth Circuit. The administration of the Bankruptcy Act within such area being governed by the decisions of the Tenth Circuit, will continue to be so governed unless this Court shall announce a rule contrary to the principle stated by the Court of Appeals for the Tenth Circuit in said Garrison case.

CONCLUSION

For reasons above stated, we believe that without any substantial reason the statutory right of creditors to elect a trustee of their own choosing has, in this case been, arbitrarily denied, and that the decision is of such far reaching importance to the business interests of this country that it should be reviewed and reversed by this Court, and that the order of the District Court reversing the Referee (T. R. pp. 79 to 85) should be affirmed.

Dated: Denver, Colorado

September———, 1956.

Respectfully submitted,

FREDERICK P. CRANSTON
Attorney for Rocky Mountain Association of Credit Men

Office and Postoffice Address
409 Equitable Building
Denver 2, Colorado

IN THE

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MOTION OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

The Rocky Mountain Association of Credit Men respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for the petitioners herein has been obtained but the attorney for the respondent herein refuses to consent to the filing of a brief by the Rocky Mountain Association of Credit Men as *amicus curiae*.

The question involved is the extent of the power of the court of bankruptcy to disallow the votes of creditors in the

election of a trustee in bankruptcy, and specifically whether creditors may be disfranchised merely because their proxies were solicited by a committee of creditors all of whom were members of a trade association to the secretary of which the bankrupt had made an assignment for the benefit of creditors.

The applicant, Rocky Mountain Association of Credit Men, is an association created by members engaged in the mercantile business, most of whom are bankers, finance companies, manufacturers, jobbers and wholesalers who extend credit to other manufacturers or wholesalers or to retailers. It is a Colorado corporation, maintaining its office in the City and County of Denver in said state, and renders services in Colorado and other states, embracing in general the area known as "the Denver trade territory". It is engaged in rendering to its members the same type of service as other associations throughout the United States render to their members in their respective localities, and is an affiliated unit of the National Association of Credit Men and its members are members of the National Association of Credit Men. A portion of the activities of the Rocky Mountain Association of Credit Men consists in safeguarding the administration of estates in bankruptcy against fraud and exploitation by persons seeking to advance their own interests as against the interests of general creditors.

The applicant believes that the question for decision is of paramount importance to the business interests of the country and should be reviewed by this Court, and that the argument of the petitioner herein as set forth in the Petition for Certiorari (a) inadequately sets forth the importance of the question presented, and (b) fails to point out the conflict between the decision in the instant case and prior decisions of other courts of equal jurisdiction with respect

to the basis upon which the court of bankruptcy may exercise its jurisdiction pursuant to Section 2 (17) of the Bankruptcy Act to disapprove the appointment of trustees by creditors.

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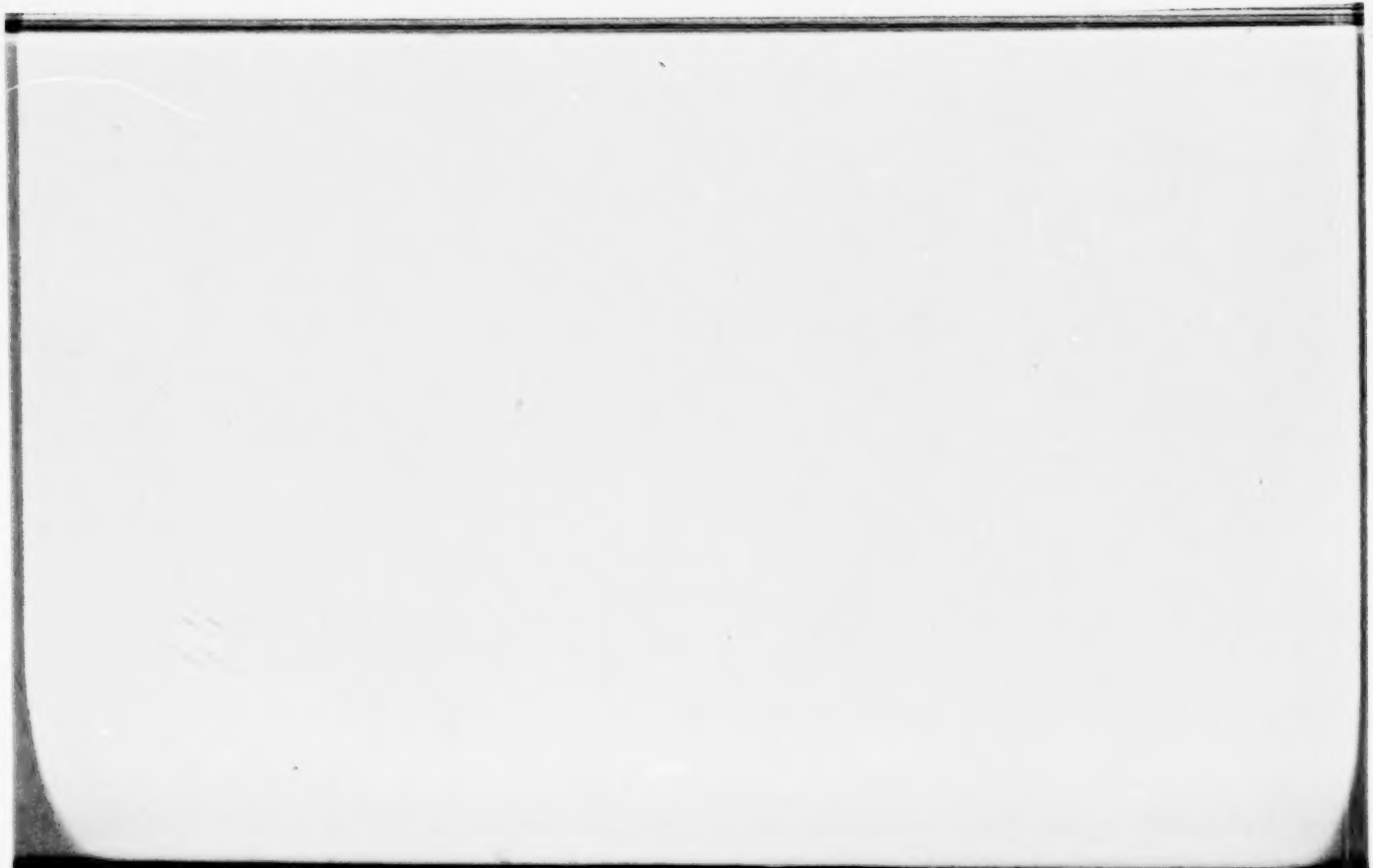
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Respondent.

OBJECTION TO MOTION OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

MAX H. MARGOLIS,
155 Montgomery Street, San Francisco 4, California,
Counsel for Respondent.



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Respondent.

OBJECTION TO MOTION OF ROCKY MOUNTAIN ASSOCIATION OF CREDIT MEN TO FILE BRIEF AS AMICUS CURIAE.

Respondent Kal W. Lines objects to the motion for leave to file brief as amicus curiae, and withheld

consent to the filing thereof, for the following and each of the following reasons:

1. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.**

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound legal discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

---

2. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.**

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the amicus curiae brief as well as the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

---

3. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.**

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. **THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT SHOW INADEQUACY OF PRESENTATION BY THE PETITIONERS.**

The proposed brief of amicus curiae is merely a proposal to adopt the proposed brief of another would be amicus curiae. It demonstrates what respondent sensed when consent to file amici curiae briefs was withheld, namely, that other Boards of Trade or Credit Associations are eager to add their weight to petitions for certiorari sponsored by one of their number, even though, as here, there is no inadequacy of presentation by the petitioners.

Wherefore, respondent respectfully submits that the motion of Rocky Mountain Association of Credit Men for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
October 4, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.

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Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

DANIEL L. BOLAND
Attorney for
NATIONAL PAINT, VARNISH & LACQUER ASSN., INC.
1500 Rhode Island Avenue, N. W.
Washington 5, D. C.



In the Supreme Court of the United States

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FALSTAFF BREWING CORP., GOEBEL BREWING COMPANY OF CALIFORNIA, MONTEVERDE & PARODI, INC., RALPH MONTALI, INC., PACIFIC GAS & ELECTRIC COMPANY, PABST BREWING COMPANY, HARRY F. RATHJEN CO., SAN FRANCISCO BREWING CORPORATION, MELVIN SOSNICK COMPANY, TWIN PEAKS DISTRIBUTING CO., VICK'S DISTRIBUTING COMPANY, N. CERVELLI & COMPANY, CALIFORNIA WINE ASSOCIATION, BROWN & BIGELOW, CARLO ARBASETTI, THE ALBERT PETERS CO.,

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Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The National Paint, Varnish and Lacquer Association, Inc. respectfully moves this Court for permission to file a brief as *amicus curiae* in this case. Consent to the filing of such a brief was granted by the petitioners but was refused by the respondent.

The National Paint, Varnish and Lacquer Association, Inc., is a non-profit, Delaware corporation, with

its principal office at 1500 Rhode Island Avenue, N. W., Washington 5, D. C. Its members, numbering approximately 1200, are engaged in the manufacture and distribution of paint, varnish, lacquer and allied products, or of the materials used in such manufacture, and collectively produce about 90 per cent of the total national volume of these products.

The National Paint, Varnish and Lacquer Association, Inc. is the national trade association for the Paint, Varnish and Lacquer Industry. It has thirty-one affiliated local paint, varnish and lacquer associations located in Atlanta, Georgia; Baltimore, Maryland; Birmingham, Alabama; Buffalo, New York; Chicago, Illinois; Cincinnati, Ohio; Cleveland, Ohio; Denver, Colorado; Dallas, Texas; Detroit, Michigan; San Francisco, California; Houston, Texas; Indianapolis, Indiana; Kansas City, Missouri; Los Angeles, California; Louisville, Kentucky; Memphis, Tennessee; Milwaukee, Wisconsin; Minneapolis, Minnesota; Nashville, Tennessee; Boston, Massachusetts; New Orleans, Louisiana; New York, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Portland, Oregon; Seattle, Washington; Richmond, Virginia; St. Louis, Missouri; Toledo, Ohio; and the District of Columbia.

The Association has an active Credit and Collections Committee representing all segments and all geographical areas of our industry. One of the primary concerns of this Committee is the collection of debts and claims from debtors of Association members. The local associations have Credit and Collection Committees similar-

ly concerned with the collection of debts owed to their members.

Member companies of the National Association and local associations are deeply concerned with the decision by the United States Court of Appeals for the Ninth Circuit reported at 233 Fed. 2d 927, which precludes creditors of a bankrupt from voting for a candidate for trustee by reason of the fact that such creditors coincidentally belonged to the same trade association.

The effect of the decision of the Court of Appeals in reversing the District Court and affirming the order of the Referee in Bankruptcy is widespread. It would place the activities of these Credit and Collections Committees in jeopardy by reason of the fact they are conducted through and by a trade association. The arbitrary and capricious exclusion of creditor-members of a trade association by the Referee in this case will result in the disenfranchisement of creditors throughout the country. There is nothing in the Bankruptcy Act or in the history of its administration to support such an abuse of the supervisory powers of the Referee.

The right to select trustees in bankruptcy rests primarily with creditors. Likewise, individual companies, firms or persons have the right of joining and engaging in the activities of a trade association. The exercise of these two rights when the creditor happens to be a trade association member should be recognized by this Court in its consideration of the petition for writ of certiorari now pending before this Court.

The privileges and functions of a trade association and of its members are directly and substantially in-

volved in this case. A full presentation of the rights involved and the need for this Court to set limitations on the supervisory powers of the Referee are required to prevent discrimination against and denial of rights under the Bankruptcy Act to creditors and trade association members.

The briefs submitted to the Court of Appeals by the parties did not make manifest the importance of this decision to creditor-members of associations and credit committees of associations generally. It does not appear likely that facts and argument relating to the impact of the decision upon these interests will be made available to the Court.

We respectfully submit that information and argument as to the effect of this decision upon credit committees country wide will aid the court in its consideration of the petition for writ of certiorari. Permission to file an *amicus curiae* brief is accordingly requested.

Respectfully submitted,

DANIEL L. BOLAND
Attorney for
NATIONAL PAINT, VARNISH & LACQUER ASSN., INC.
1500 Rhode Island Avenue, N. W.
Washington 5, D. C.

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155 Montgomery Street,
San Francisco 4, California,
Counsel for Respondent.

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sent to the filing thereof, for the following and each of the following reasons:

1. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW.**

The decision of the Court of Appeals is to the effect that a referee in supervising the election of a trustee may apply the principles and rules of equity jurisprudence, and that *under the facts and circumstances of the particular case* the referee exercised a sound discretion in doing so. The decision was confined and will be confined to the factual setup of the particular case, and it poses no important question of law requiring settlement by this Court.

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2. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A CONFLICT OF DECISION.**

A plain reading of the case of *Garrison v. Pilliod Cabinet Co.*, 50 F. 2d 1035, upon which the petition for certiorari relies as basis for a contention that conflict of decision exists, brings the ready conviction that the cited case is in harmony rather than in conflict with the decision herein.

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3. **THE PETITION FOR CERTIORARI DOES NOT INVOLVE A DECISION THAT IS INCORRECT.**

The decision of the Court of Appeals is its own best advocate. It is sound in law and sound in fact and no occasion exists for disturbing it.

4. THE PROPOSED BRIEF OF AMICUS CURIAE DOES NOT ACCOMPANY THE MOTION, AND INADEQUACY OF PRESENTATION BY PETITIONERS IS NOT SHOWN.

The above considerations suffice to defeat the motion. Stripped of all pretense, moreover, the motion merely indicates that Boards of Trade, Credit Associations, and similar organizations, in general, are of the view that this Honorable Court should grant certiorari because one of their number, in particular, is dissatisfied with the ruling of a referee in a bankruptcy proceeding.

Wherefore, respondent respectfully submits that the motion of National Paint, Varnish & Lacquer Assn., Inc., for leave to file brief as amicus curiae should be denied.

Dated, San Francisco, California,
October 10, 1956.

MAX H. MARGOLIS,
Counsel for Respondent.